



ARBITRATION IN COMMERCIAL DISPUTES AND PROBLEM OF JUDICIAL INTERFERENCE IN INDIA

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Abstract

When arbitration was first introduced in India through the enactment of Arbitration and Conciliation Act, 1996 it was coveted to resolve business problems and smoothen the process of conflict resolution. Challenges in the realization of objectives of the Act have been deciphered by the Supreme Court and the High Court through its numerous decisions. The courts understood the paradoxical perspectives in the Act that sought to destroy the rudimentary aspects of the Act. However, undue interference by courts on several occasions is uncalled for.

The objectives of this paper is to explore the various problems associated with international commercial arbitration in India. Arbitration is an indispensable tool for dealing with the problem of huge case pendency in courts. However, it should be made suitable to the local conditions of a given place and be kept away from unwarranted judicial interference in arbitral proceedings.

Keywords: Arbitration, Indian courts, award, foreign, relief.

Introduction

For doing business in India, a faster mode of dispute resolution is indispensable since court cases take massive time in reaching settlement. Slow adjudication of disputes and overburdening of courts can derail further prospects of economic development for the country. Though arbitration was formally recognized under the Indian Arbitration Act, 1940, it was more of a general law based largely upon the English Arbitration Act, 1934. The Act was replaced by Indian Arbitration and Conciliation Act, 1996 to comply with the UNCITRAL Model Law on International Commercial Arbitration (hereinafter “Model Law”) adopted by the United Nations Commission on International Trade Law in 1985.¹

Arbitral proceedings under the Act call for ad hoc arbitration, Institutional Arbitration, Statutory Arbitration and International Arbitration. Ad-hoc Arbitration commences with arbitration agreement. Institutional Arbitration involves streamlined procedures and arbitral proceedings are undertaken by Institutions of Arbitration. Statutory arbitration is provided and sanctioned by law and International Arbitration involves dispute resolution between nations or parties located in different jurisdictions or countries. These four kinds of arbitration are recognized under the Act. Owing to international relevance of arbitration, India is a party to the Geneva Protocol on Arbitration Clauses of 1923 (hereinafter “1923 Geneva Protocol”),² Geneva Convention on the Execution of Foreign Arbitral Awards, 1927 (hereinafter “1927 Geneva Convention”)³ and the New York Convention of 1958 on the Recognition

¹ UNCITRAL Model Law on International Commercial Arbitration, Dec. 11, 1985, G.A. Res. 40/72, U.N. Doc. A/RES/40/72.

² Geneva Protocol on Arbitration Clauses, Sept. 24, 1923, 27 L.N.T.S. 157.

³ Convention for the Execution of Foreign Arbitral Awards Geneva, Sept. 26, 1927, 92 L.N.T.S. 301.



and Enforcement of Foreign Arbitral Awards (hereinafter “New York Convention”).⁴ The Arbitration and Conciliation Act, 1996 consists of Part I and II holding wider principles of Model Law. Part I encompasses provisions for structure of arbitral tribunal and non-intercession by courts. Part II is largely based on New York Convention and 1927 Geneva Convention. It is not a comprehensive code and is limited to implementation of remote recompenses legislated in these two conventions. Section 9 of the Act allows parties to request the court for interim measure at any time, before or during the arbitral proceedings.⁵ It is not incompatible with an arbitration agreement between the parties and is corroborated by Article 9 of the UNCITRAL Model Law.⁶ This right is available at all times and is not dependent upon parties’ issuing notice for invoking the arbitration clause.⁷

The Arbitration and Conciliation (Amendment) Act, 2015

The Indian courts have consistently practiced greater involvement in commercial

arbitrations held outside India especially after Supreme Court’s decision in *Bhatia International v Bulk Trading S.A. and Another*.⁸ For that matter, the court in *Venture Global Engineering v Satyam Computer Services Ltd. and Another*, went to the extent of assuming jurisdiction for hearings in cases challenging foreign awards.⁹ This being detrimental to India’s global image, the apex court took a stronger stance in *Bharat Aluminum Ltd. Co. v Kaiser Aluminum Technical Service Inc. (hereinafter “BALCO”)* by holding that Part I and Part II of the Act are mutually exclusive and that Part I will not apply in cases where seat of arbitration is chosen outside India. The Supreme Court went on to paralyze Indian courts for their interference with foreign awards in any manner except for enforcement.¹⁰

Enormity of difficulties ensued post this decision as the interim relief was no longer made available to the parties in India. Even if sanctioned by the foreign arbitral tribunal, the relief became unenforceable in India since it

⁴ Convention on the Recognition and Enforcement of Foreign Arbitral Awards, June 10, 1958, 330 U.N.T.S. 3.

⁵ Section 9 of the Act states that “A party may, before, or during arbitral proceedings or at any time after the making of the arbitral award but before it is enforced in accordance with section 36, apply to a court-

i. for the appointment of a guardian for a minor or person of unsound mind for the purposes of arbitral proceedings; or ii. for an interim measure of protection in respect of any of die following matters, namely: -

a. the preservation, interim custody or sale of any goods which are the subject-matter of the arbitration agreement;

b. securing the amount in dispute in the arbitration;

c. the detention, preservation or inspection of any property or thing which is die subject-matter of the dispute in arbitration, or as to which any question may arise therein and authorizing for any of the aforesaid

purposes any person to enter upon any land or building in the possession of any part) or authorizing any samples to be taken or any observation to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence;

d. interim injunction or the appointment of a receiver; e. such other interim measure of protection as may appear to the Court to be just and convenient, and the Court shall have the same power for making orders as it has for the purpose of, and in relation to, any proceedings before it.”

⁶ *Supra* note 1.

⁷ *Sunderam Finance Ltd. v. NEPC India Ltd.*, AIR 1999 SC 565.

⁸ (2002) 4 SCC 105.

⁹ (2008) 4 SCC 190.

¹⁰ (2012) 9 SCC 649.



ceased to be qualified as a “foreign award” under Part II of the Act. And therefore, the Act was amended in 2015 to restore the power of Indian courts to grant interim relief unless the parties themselves chose to opt out of this provision. The amendment did not clarify if the arbitration agreement should expressly exclude the jurisdiction of Indian courts leading to confusion. If the jurisdiction is impliedly excluded, it would have defeated the purpose of the amendment. Moreover, if two Indian parties are involved in arbitration which is foreign seated, it remains blurred if at all any interim reliefs will be made available to them by the Indian courts.

The 2015 amendment adds more strength to the order of arbitral tribunal by alleviating it to the order of a civil court. Even for interim relief, the parties can no longer approach the civil court unless the tribunal fails. Much of the interventions by the judiciary were at the pre-litigation stage comprising of application to court for seeking reference to arbitration in a proceeding pending under section 9 or for appointment of arbitrators in the event of a deadlock between the Parties under section 11 of the Act. Under both of these sections, the ultimate word of the court determined the validity and jurisdiction of the arbitration agreement and thus, ousted the jurisdiction of arbitral tribunals. The courts are now empowered to only determine the existence of the agreement to conclude validity. They can no longer tread on any other issues relating to arbitration agreement. While a third party is also allowed to make reference under section 8, it amends the existing position taken in *Sukanya Holdings Pvt. Ltd v Jayesh H. Pandya & Another*. In this case, non-signatories to the arbitration agreement

were not allowed to refer the dispute to arbitration.¹¹ The Supreme Court’s judgment in *N. Radhakrishnan v Maestro Engineers & Others* also stands clear as now the courts will have to direct the parties to arbitration where the arbitration agreement exists even in cases of fraud. However, the extent of judicial intervention went to the extreme before 2015 especially where the award was challenged on the grounds of public policy.¹²

With the amendment, stricter timelines for quick disposal of arbitration proceedings are provided for along with the schedule of fees to be charged by arbitrators. The High court now has the power to make rules for fixation of fees for arbitrators. Moreover, to ensure impartiality of Arbitrators, section 12(1) along with the fifth schedule of the Act requires the arbitrator to disclose circumstances which may lead to doubts regarding his credibility. This is keeping in tune with the IBA Guidelines on Conflict of Interest in International Arbitration. Also, for the purpose of boosting institutional arbitration, various international arbitration institutions have been set up in India making it a more conducive center for conducting international commercial arbitrations.

Arbitral Centers in BRICS Nations

In the conference on ‘International Arbitration in BRICS-Challenges, Opportunities and Road Ahead’, jointly organized by Department of Economic Affairs, Ministry of Finance, Government of India, Federation of Indian Chambers of Commerce and Industry (FICCI) and Indian Council of Arbitration (ICA) in New Delhi on August 27, 2016, the need for a task force comprising of experts and officials was

¹¹ (2003) 5 SCC 531.

¹² (2010) 1 SCC 72.



recommended for the purpose of establishing arbitral centers in India and for looking into various challenges facing international arbitration with special reference to BRICS nations.¹³

Judicial intervention was disfavored by the Ministry and the credibility of lawyers was questioned in such cases. This issue was highlighted as one of primary importance as the arbitral awards are generally seen to target emerging economies. It was also emphasized that the disputes be settled in local courts for the first five years failing which they may be resorted to arbitration and the frivolous cases be quickly disposed. Successful arbitration could only be possible with regional cooperation and a common framework among BRICS nations. This would help in bringing down the arbitration costs and augment trust in investors across BRICS jurisdictions. It is imperative to improve international ranking of India for doing business as it fosters a healthy investment climate in India.¹⁴

Promoting Institutional Arbitration in India

Owing to inordinate delays in dispute settlement and lack of infrastructure for arbitration, India became an unattractive venue for international arbitration. Thus, the need was felt to promote institutional arbitration in India. For dealing with commercial disputes, it was suggested by FICCI to appoint expert judges.¹⁵ It was also suggested that arbitration must not be viewed as a part time activity reserved only for

weekends or after court hours as majority of the lawyers do. It should instead be given more priority. Participation of foreign lawyers through 'fly-in, fly-out' can help play a significant role in turning India into a desired arbitration hub. A code of ethics for arbitrators was emphasized by the Supreme Court in 2014 by Justice Sikri, a senior Judge, to enable the arbitrators to reflect upon the time frames for speedy conclusion of arbitral proceedings. The code was recommended to boost public and parties confidence at both domestic and international level. It was brought forth that although ninety-seven percent of the arbitral awards are upheld by courts yet there is a need to revisit the situation of their enforcement in India. It was felt that arbitration system of Singapore should be followed as a model for ensuring timely and inexpensive settlement of commercial disputes. Also, Institutional arbitration should be given preference over ad hoc arbitration.¹⁶ This is because ad hoc arbitrations involve long delays, huge costs and complicated procedures for settlements. These hindrances are the result of the retired judges who act as presiding officers to arbitration but hold expertise only in court procedures. They seldom recognize the intricacies of arbitration as a separate mode of dispute resolution. In this context, institutional arbitration proves advantageous as it has a more organized structure in the form of skilled staff, standard international rules and a proper fee structure.

India as Centre for Arbitration

¹³ FICCI, "Jaitley Suggests Task Force to help set up Arbitral Centers in BRICS Nations", *FICCI Business Digest* 18 (2016).

¹⁴ ASSOCHAM, Report on India needs dedicated bar for timely disposal of arbitration disputes (Ministry of Law and Justice, 2018).

¹⁵ FICCI, "Promote Institutional arbitration to make India a business haven", *FICCI Business Digest* 20 (2015).

¹⁶ *Ibid.*



For facilitating fast track resolution, the Commercial Courts, Commercial Division and Commercial Appellate Division of High Courts Act, 2015 has been passed. These reforms aim at improving the institutional capacity of the country and have been undertaken by strong resolve of the government and the judiciary.¹⁷

ASSOCHAM Reforms

ASSOCHAM paper on 'Reforms in Indian Legal System,' contends that the delays in disposal of disputes have adversely affected the country's GDP and has resulted in divergence of these cases to foreign commercial courts. Pendency of such cases in Indian courts bring economic losses to parties. They create an environment of policy uncertainty much to the dilapidation of investors.

ASSOCHAM has, therefore, recommended various measures to reduce pendency in Indian courts. These measures involve creation of modern infrastructure, establishment of special benches to hear Intellectual Property cases, increase in number of judges and establishment of an international standard arbitration center in Delhi. For tackling with frivolous litigation, a National litigation Policy is suggested with a view to fix the responsibility in a more transparent manner. Also, cases in trial courts, whether criminal or civil, with pendency of over twenty years should be closed. This should be done under the policy guidelines of apex court and the government. For arbitration cases, the maximum period of pendency that should be allowed is one year

failing which it may be brought under the scanner of the relevant High Court or eventually the Supreme Court.

Undue interference by Indian judiciary in foreign arbitral awards led to the diminished faith of investors for conducting arbitration in India. It became difficult for the foreign companies to get their awards enforced in India as these awards were generally subjected to stay in most of the cases. This ran counterproductive to country's interest in attracting foreign investments. Since the awards cannot be challenged in Indian courts now,¹⁸ many experts are of the view that Indian parties will be restrained from seeking any relief from Indian courts in cases where the contracts have been executed with foreign parties. It would also not be possible for the Indian parties to obtain relief from foreign courts. Mired in such circumstance, even immediate relief is of no avail.

State of International Arbitration in India post-reforms

As foreign investment is prominent for the growth of the country, it demands inexpensive and stable dispute resolution environment. While BALCO decision made a breakthrough in development of Indian arbitration law, there still remains certain areas highlighting the ways in which the arbitration disputes are handled in India.

To begin with, International commercial arbitration helps parties resolve disputes who may otherwise be insecure about foreign court systems. The Arbitration and

¹⁷ Press Information Bureau, "Global Conference to Make India the Centre for Arbitration gets underway in New Delhi" NITI AAYOG, available at: <http://pib.nic.in/newsite/PrintRelease.aspx?relid=151811> (Last Modified July 22, 2018).

¹⁸ Indu Bhan, "SC: Foreign arbitration awards can't be challenged in India" *The Financial Express*, July 24, 2018.



Conciliation Act 1996 was enacted to provide a fairer mechanism for dispute resolution in the most cost effective manner. The Act is mainly divided into three parts. Part I consists of general provisions relating to regulation of arbitral proceedings. Part II deals with enforcement of certain foreign awards and Part III deals with conciliation. Section 34 of the Act allows the Indian courts to take decisions where the arbitration is seated outside India.

The Supreme Court of India has interpreted the various provisions of the Act in its numerous decisions. For instance, in *Bhatia International v. Bulk Trading S.A.*, the Apex Court took a broader stance in holding that Part I of the Act applies to foreign arbitrations and therefore, the Indian court can validly grant interim reliefs in the present case involving arbitration at Paris. In *Oil & Natural Gas Corp. v. Saw Pipes Ltd.*, the Supreme Court set aside a foreign arbitral award for being contrary to public policy and illegal as the award substantially varied with the domestic law.¹⁹ This case was further unfolded in *Venture Global Engineering v. Satyam Computer Services Ltd.*, by the Indian Supreme Court which invalidated an arbitral award on the application of a foreign party. In this case, a joint venture between U.S. and Indian company was entered into where the shareholder's agreement was the disputed issue. The agreement allowed the non-defaulting shareholder to purchase the defaulter's share at book value and cause dissolution. The Defending party won the arbitration and sought to enforce the same in U.S. The petitioners filed the case before Supreme Court of India and were successful

in setting aside the decision of foreign arbitration.

These decisions culminated into direct intrusion of Indian courts into foreign seated arbitrations. This is not conducive with the purpose and objectives for which the Act was enacted. Such decisions also defeat the sole purpose of arbitration and depletes the benefits which could have been bestowed upon the parties by resorting to arbitration as a mechanism over lengthy litigation. Besides, The New York convention obligates the contracting parties to enforce foreign arbitral awards except under limited circumstances. Eventually in *Bharat Aluminum Co. v. Kaiser Aluminum Technical Service, Inc.*, the previous decisions were altered by the Supreme Court by relying upon UNCITRAL Model Law. The court barred the Indian courts from granting any interim relief in cases of challenge of foreign awards. With the decision being prospective, the court forever banned the cancellation of foreign awards by Indian judiciary. However, the enforcement of foreign awards are left open for challenge on grounds of public policy as explained in *Oil & Natural Gas Corp. v. SAW Pipes Ltd.* This is not entirely in compliance with New York Convention. Mired in ambiguity, public policy as a ground can still be stretched by the parties to challenge foreign awards. Moreover, awards granted in countries that are non-signatories to the New York Convention or European Convention on International Commercial Arbitration,²⁰ and which fall outside the applicability of the Arbitration and Conciliation Act, 1996 cannot, therefore, be enforced in India.

¹⁹ (2005) 5 S.C.C. 705.

²⁰ European Convention on International Commercial Arbitration, Apr. 21, 1961, 484 U.N.T.S. 349.



Another prominent issue is the applicability of Indian law in a dispute involving Indian parties in a foreign-seated arbitration. The BALCO case suggested that it should be governed by Indian law. Prior to this decision, the parties were compelled to apply Indian law if asked by the arbitral tribunal under section 28 of the Act. This section is no longer applicable to foreign-seated arbitrations as it falls in Part I of the Act. So, now the parties are deprived from seeking adequate relief from Indian courts. In such a scenario, the governing law could be bemusing, if not explicitly stated by the parties in their contracts. Sometimes, it may not be possible for parties to choose India as the desired seat of arbitration for lack of bargaining power. They may also lack financial resources to arbitrate in a foreign land. In such a case, they are left without a remedy. This may encourage taking away of assets from India by foreign parties thereby making it difficult to enforce foreign awards in India. Moreover, there are very few arbitral institutions in India. The Supreme Court in *S.B.P. & Co. v. Patel Engineering Ltd.*, choose a Supreme Court or a High Court judge as the authority to nominate an arbitrator leading to interference by the judiciary and diminished role played by arbitral institutions in dispute settlement.²¹

At this juncture, it could be useful if broad parameters of public policy are defined or else the enforcement of foreign arbitral awards can be successfully blocked. Moreover, remedy for interim relief should be made available to parties so as to prevent selling of assets situated in India. Parties should choose Indian law as the governing law in their contracts. The enforcement of

non-convention awards should also be addressed.

Above all, the BALCO decision brought forth a conducive environment for conducting international arbitrations in India. It is also a symbol of nation's efforts in becoming one of the best places for international arbitrations worldwide. While certain areas still needing consideration, the case is a pristine reflection of the existing obstacles for India in becoming a much coveted arbitration hub.

Conclusion

Distressing state of affairs for arbitration in India is the result of various impediments encountered by parties every time a dispute is referred to an arbitral tribunal. Delays at different stages of arbitral proceedings fails to ward off the difficulties experienced in court systems throughout the country. As a consequence, the businesses suffer. The existing framework of arbitration law in India should meet the prerogative as devised by the UNCITRAL Model Law.

Although the Arbitration and Conciliation Act, 1996 has hitherto been subject to numerous modifications and amendments, many of these changes have largely remain inapplicable. These have been taken into notice by the Supreme Court and High courts from time to time. The courts have attempted to address the various issues through interpretations especially ones that have resulted in the failure in achieving the main objectives of the Act.

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